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INDEX TO CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 629.

ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

LIZZIE M. MIMS, AS ADMINISTRATRIX OF THE ESTATE OF JOHN J. MIMS, DECEASED, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error, Lizzie M. Mims, as administratrix of the estate of John J. Mims, deceased, by her counsel, Jo-Berry S. Lyles, John H. Clifton, W. S. Nelson and J. Team Gettys, appearing in her behalf, and moves the Court to dismiss the writ of error in the above entitled case, for want of jurisdiction and upon the grounds set forth in the brief filed herewith.

The defendant in error further moves the Court to affirm the judgment rendered by the Supreme Court of the State of South Carolina, upon the ground that it is manifest that the writ of error was taken for delay only, and that the questions from which the decision of the cause depends are so frivolous as not to need further argument.

The defendant in error further moves the Court, in the event that it should desire to hear argument on the questions involved, that this cause be transferred to the summary docket and there be proceeded with on the ground that the cause is of such a character as not to justify extended argument.

The grounds of this motion, the statement of the case and the argument thereon, are more fully set forth in the accompanying brief, all of which is respectfully submitted herewith.

JO-BERRY SLOAN LYLES,
WILLIAM S. NELSON,
J. TEAM GETTYS,
JOHN H. CLIFTON,
Attorneys for Defendant in Error.

To Messrs. P. A. Willcox, Lucien W. McLemore, Charles H. Barron and Douglas McKay, Attorneys for Atlantic Coast Line Railroad Company, Plaintiff in Error:

Dear Sirs: Please take notice that on Monday, the —— day of April, A. D. 1916, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for its decision.

Attached hereto please find copy of the motion to dismiss or affirm, the brief and argument to be submitted in support thereof, and also the motion to transfer this cause to summary docket, if the Court should desire to hear argument thereon.

JO-BERRY SLOAN LYLES,
WILLIAM S. NELSON,
J. TEAM GETTYS,
JOHN H. CLIFTON,
Attorneys for Defendant in Error.

The foregoing notice is hereby accepted and delivery of a copy thereof, together with the above mentioned motion and brief therein mentioned, are hereby acknowledged this —— day of March, A. D. 1916.

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Attorneys for Atlantic Coast Line Railroad Company, Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 629.

ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

LIZZIE M. MIMS, AS ADMINISTRATRIX OF THE ESTATE OF JOHN J. MIMS, DECEASED, DEFENDANT IN ERROR.

STATEMENT OF DEFENDANT IN ERROR.

This suit was commenced in the Court of Common Pleas for Richland county, South Carolina, in April, 1911. The action was brought by Lizzie M. Mims, as administratrix of the estate of her husband, John J. Mims, to recover damages for herself and four minor children on account of the death of her husband on December 19, 1910, alleged to have been caused by the joint and concurrent carelessness, negligence, recklessness, wilfulness and wantonness of the defendants, Atlantic Coast Line Railroad Company and S. B. Divine, in that (1) while John J. Mims, the deceased, was crossing Harvin street, a public street of the city of Sumter, S. C., the defendant, Atlantic Coast Line Railway Company, ran backwards one of its engines and tender on one of its tracks across said Harvin street, at an excessive and reckless rate of speed and in violation of its own rules and regulations as to speed; (2) in running said engine and tender backwards without having anyone on the rear of said engine or tender to keep a lookout in the direction in which said engine and tender were being run, and in violation of its own rules:

(3) that the bell was not rung or the whistle blown on approachin Harvin street (where John J. Mims was killed), a public crossing and no signal or warning whatever of the approach of said engin and tender was given as required by law; (4) that the engine wa not stopped when the engineer (S. B. Divine), saw or should hav seen that John J. Mims would be run into and over if said engin was not stopped (R., pp. 1-3).

The case was first tried in the Court of Common Pleas for Rich land county, in April, 1912, when, at the close of all testimony, nonsuit was ordered by the trial Judge. Upon appeal this order o nonsuit was reversed by the Supreme Court of South Carolina an the case sent back for a new trial. *Mims* v. *A. C. L. R. R. et al* 95 S. C., 370, 78 S. E. 1031. The second trial was had in th Court of Common Pleas for Richland county, ———, 1914, an resulted in a verdict for plaintiff, defendant in error herein, fo sixteen thousand ($16,000) dollars (R., p. 1).

It was developed by testimony brought out at this trial that Mim the deceased, was a car inspector at the time he was killed, in th employ of the Atlantic Coast Line Railroad Company, in its yard at Sumter, S. C. That one of his duties was to inspect trains upo their arrival in the yards, and at the time he was killed he wa going across the tracks of the defendant in defendant's yards a Sumter, S. C., on Harvin street, a public street of the city of Sum ter, S. C., where it crosses the railroad tracks of the defendant, an was going diagonally from the Gibson train, which was already i the yard, to the Orangeburg train, which had just arrived, an supposedly for the purpose of inspecting it. There was no affirma tive evidence as to where Mims was going when he received th injuries which resulted in his death. He was killed by a detache switch engine in charge of the defendant, S. B. Divine, workin on the Sumter yard. The Orangeburg train runs from Orangebur by way of Sumter and Lanes to Florence and return, all within th State of South Carolina (R., pp. 8-10, 12-14).

This action was brought by the plaintiff for the death of plain tiff's intestate as a member of the general public and not under th Federal Employers' Liability Act, against the Atlantic Coast Lin Railroad Company as a corporation, and S. B. Divine, a citizen o the State of South Carolina, as an individual. Both the corporat and personal defendants filed separate answers setting up the sam defenses. The plaintiff's recovery does not exceed the pecuniar loss to herself and children. Affirmative answers to the qestion propounded by the plaintiff in error to the several witnesses woul not have established the fact that plaintiff's intestate, at the time o

his death, by reason of the carelessness of S. B. Divine, in running the shifting engine, was engaged in interstate traffic.

In going from the Gibson train in the direction of the Orangeburg train, Mims, the deceased, had to cross Harvin street, one of the main thoroughfares of the city, a much traveled place, and a place where he had a right to be and to expect that he would be protected, particularly against shifting engines.

A more detailed statement of the facts of the case is not necessary, in that the assignments of error herein, which will be considered later, concern only the refusal of the trial Judge to allow the plaintiffs in error to introduce testimony at the trial which they claim would show or tend to show that John J. Mims, the deceased, was engaged in interstate commerce at the time of his death.

At the first trial of this case, and in the appeal therefrom, 95 S. C., 370, no mention was made of the Act of Congress—Federal Employers' Liability Act—and if the defendants had any defense under that Act it was as available to them on the first trial as at the second trial. Not only was no mention of the Federal Act made during the first trial and the appeal, but at the second trial the defendants asked leave of the Court, and over objection of plaintiff, were permitted to amend their answers by setting up the defense of gross and wilful contributory negligence of the plaintiff's intestate under the South Carolina statute (R., p. 5).

It will be observed that the complaint states no facts that would make the Federal Employers' Liability Act applicable—it is not even alleged that plaintiff's intestate was an employee of the defendant railroad company, and so far as the pleadings show and the issue made by plaintiff, he occupied the position of one of the general public killed at a public crossing, nor is it alleged that the defendant railroad company was an interstate carrier; the allegation in paragraph 3 of the complaint being that the defendant railroad company owned, controlled and operated a certain line of railroad * * * extending from and through the city of Sumter, in the county of Sumter, State of South Carolina, to the city of Columbia, in the county of Richland, in the State of South Carolina. The answer of the defendant states no facts which would show that the Federal Employers' Liability Act has any application. It in effect admits that the defendant is an intrastate carrier, and plaintiff's intestate was killed by one of defendant's engines at Sumter, S. C., on the 19th day of December, 1910, and, of course, denies the allegations of neglect or disregard of duty. It further sets up the defense of contributory negligence generally, and the further defense under the South Carolina statute of gross and wilful negligence on the part

of plaintiff's intestate, Section 3230, Code of Laws S. C. 1912, which statute applies to injuries received at a public crossing (Appendix 15).

The plaintiff's case was stated under the South Carolina statute, Lord Campbell's Act, Sections 3955-7, Code of Laws S. C. 1912—(Appendix 15) and was stated without reference to the employment of plaintiff's intestate, but as if he were one of the general public.

At the close of plaintiff's testimony, the attorneys for the defense prefaced their offer of evidence with a statement that they would offer testimony to show that plaintiff's intestate was engaged in interstate commerce, introducing such evidence solely for the purpose of showing that the statute under which plaintiff brought her action had been superseded by the Act of Congress. His Honor, the trial Judge, took the position that the testimony offered was irrelevant, not responsive to the pleadings and not an issue in the case, and in effect that under the State practice he would exclude same. No motion for amendment was made (R., pp. 21-31).

Thus was brought up the question before the Supreme Court of South Carolina as to whether or not, under the State practice, it was necessary to plead the Federal Act, or such facts as would make the Act applicable, if the defendant intends to invoke that Act as a defense.

DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

The Supreme Court of the State of South Carolina, on appeal, 100 S. C., 375, 85 S. E., 372, held:

> "Exceptions 1 and 2 allege error on the part of the presiding Judge in refusing to allow certain testimony, which the appellants contend would show that when plaintiff's intestate was killed he was engaged in interstate commerce, and in refusing to allow testimony which defendants' counsel stated they would offer for the purpose of bringing the case under the Employers' Liability Act, and the remarks of the Judge at that time. His Honor took the position that the testimony was irrelevant, and not responsive to the pleadings and not an issue in the case. That the case had been passed upon by the Supreme Court and an amendment, over objection of plaintiff, allowed just before proceeding with the second trial. After the plaintiff's testimony was all in, for the first time it seems to have occurred to the defendants that they wanted to avail themselves of the Federal Statute, Employers' Liability Act. The facts in every case should be pleaded. Whenever the

pleadings show facts pleaded that the case is one that can be tried either under the Federal or State law, then the Court can try it under either law. When the pleadings show facts that bring it under the Federal law, it must be tried under the Federal law, and when the pleadings show it is brought under the State law, it must be tried under that law.

The complaint was filed April 5, 1911, and alleges deceased was killed December 19, 1910, and alleges defendants controlled and operated its railroad in the counties of Sumter and Richland, and cities of Sumter and Columbia, S. C., and it nowhere alleges that the defendants operated its road in any other State than South Carolina, and there is no allegation in the complaint whereby it could be inferred that defendant railroad was engaged in interstate commerce, but the complaint clearly alleges that at the time of the death of the deceased it was engaged in intrastate business. The defendants answered without alleging that at the time the deceased was killed, while in their employment, that he was engaged in the inspection of a car which was engaged in interstate commerce. These facts must have been known, or should have been known, to them if they existed. They try the case in 1912, before Judge Spain, defendants obtain a nonsuit, which, upon appeal, is reversed, and the case is ripe for a trial before Judge Memminger, and a motion to amend answer is made and allowed, and still no effort made to set up this defense and advertise the plaintiff of this defense. It does seem to us that justice and fair dealing under all of the circumstances of the case should have been required the defendants if they intended to invoke the benefits, which they thought would ensue to them under the Act of Congress to plead the facts applicable to bring it under the Act. It would be an injustice at this stage of the case to allow this defense. The plaintiff alleged he was engaged in intrastate commerce when he was killed. The first trial showed that he was. When his Honor, in the exercise of his discretion, allowing the defendants to amend their answer permitting them all they asked for, there was no hint or suggestion that he was engaged in interstate commerce. If he was, the information was, or should have been, known to them, and if they desired to raise this issue they should have set forth such allegations in their answer as to raise an issuable fact, but this they failed to do, but knowing that the plaintiff, by her pleadings, based her case on the State law, and after a trial under that law and an appeal without any reference or suggestion even or allegation

being made to the Federal Employers' Liability Act, or that the deceased at the time of his injury was engaged in interstate commerce waits until close of plaintiff's testimony in the second trial, and, without even seeking to amend their answer, attempt to bring into the case by introducing evidence and seek a direction of a verdict upon a ground not pleaded. The plaintiff alleges that she has a cause of action against the defendants and is entitled to a trial either under the State or Federal law, the pleadings made out a case to be tried under the State law, and under the pleadings his Honor was correct in ruling as he did. It is not necessary to plead either a State or Federal statute, but it is necessary to plead facts which bring it under one or the other, and when the pleadings show that it was interstate commerce the State or Federal Courts try it and Federal law governs, when the pleadings show it was intrastate commerce the State law governs. The defendants should have pleaded the Federal Act, or, at least, such facts as would render the Act applicable, and inasmuch as they did not do so, and the pleadings made out a case based on the State law, the exclusion of the evidence by his Honor complained of was proper, as it was not responsive to any issue raised by the pleadings. If there had been an allegation in the answer that brought it within the Federal Employers' Liability Act, it would have been controlled by the Act, although the provisions may not have been referred to in express terms in the pleadings, and proof would be allowed in the case, but in this case there is no such allegation, and his Honor committed no error, and these exceptions are overruled."

ARGUMENT.

We submit that the decision of the South Carolina Supreme Court is sound and in accord with authority, and will not be reviewed by this Court; that no Federal question was raised or passed upon in the South Carolina Court.

The case at bar is on all fours with *Bradbury* v. *C., R. I. & P. Ry. Co.*, 149 Iowa, 51, 128 N. W., 1, which case was brought to this Court on a writ of error—*C., R. I. & P. Ry. Co.* v. *Bradbury*, 223 U. S. 711, 56 L. Ed., 624, where, in a memorandum opinion, the writ was dismissed for want of jurisdiction. The case now before the Court is even stronger than the Bradbury case, for there the testimony seeking to bring the case under the Federal Act was admitted and subsequently struck out, on the ground that whether the plaintiff was engaged in interstate commerce was not an issue.

The defendant offered to amend its answer so as to make it an issue. In the case now before the Court the testimony which the plaintiff in error sought to introduce was not admitted, and plaintiff in error, defendant below, did not seek to amend its answer to make the issue.

While in the Bradbury case this Court filed only a memorandum decision, dismissing the writ for want of jurisdiction, an examination of the record, and briefs filed show the case to be almost identical with the case now before the Court, and the Federal question there was sought to be raised in the same manner.

The decisions relied upon below by plaintiff in error: *M. K. & T. R. Co.* v. *Wulf*, 226 U. S., 570, 57 L. Ed., 335; *St. L. & C. R. Co.* v. *Hesterley*, 228 U. S., 702, 57 L. Ed., 1031; *St. L. S. F. T. R. Co.* v. *Seale*, 229 U. S., 156, 57 L. Ed., 1120; *N. C. R. R. Co.* v. *Zachry*, 232 U. S., 248, 58 L. Ed., 591; *Grand Trunk W. R. Co.* v *Lindsay*, 233 U. S., 44, 58 L. Ed., 838; *Toledo & St. L. R. Co.* v. *Slavin*, 236 U. S., 454, 59 L. Ed., 671, it was contended, sustained its position that the Federal Act, or facts making it applicable need not be pleaded, but that the benefits of the Act could be invoked under a general denial. We submit, however, in those cases the Federal Act, or facts making that Act applicable, were pleaded, or else the State Supreme Court considered the construction and application of the Act properly raised before it, and rendered decision upon it, and this Court passed upon the question only in view of a State Court having considered or assumed the record sufficiently presented a question of Federal right.

In the *Wulf* case it was set up in defendants' answer that the deceased was in the employ of defendant engaged in interstate commerce, and that the cause of action was governed by the Federal Act.

In the *Hesterly* case the Court holds the Federal question may be deemed to have been presented with sufficient clearness to sustain a writ of error from the Federal Supreme Court to a State Court, where the State Court has held that the question was sufficiently raised and decided. At the trial the defendant asked for ruling that plaintiff could not recover damages for pain under the second count. which was denied. The Supreme Court of Arkansas treated the request as intending to raise the question of whether the Federal Employers' Liability Act displaced the State law, and held that the Act was only supplemental, and that the judgment could be held under the State law. 98 Ark., 240. The Supreme Court of the United States says:

"The plaintiff contends that the claim of right under the law of the United States, and against that under the law of the State, was not presented with clearness enough to save it, *but as the Supreme Court held the question sufficiently raised and decided it*, that objection is not open here." (Italics ours.)

In the *Zachery* case, *supra*, it appears that the *defendant's answer, besides denying the allegations of negligence, set up a special defense that at the time plaintiff's intestate was killed he was engaged in interstate commerce as an employee upon the train of defendant lessee, and that under the Federal Employers' Liability Act the plaintiff was not entitled to recover.* At the close of the plaintiff's testimony, defendant moved for a nonsuit upon the ground that the plaintiff was engaged in interstate commerce, that the Act of Congress was exclusive and regulated the liability of defendant and plaintiff had failed to make out a case of liability under the Act. The Court denied the motion and held the case was brought under the statute of North Carolina, and that the Federal Act had no application and the case was triable under the State statutes. The Supreme Court of the United States says:

"In support of the judgment, it is earnestly argued that the question whether deceased was employed in interstate commerce was not properly raised in the trial Court, in accordance with the pertinent provisions of the local Code of Civil Procedure. *But this is a question of State practice; and since it appears that defendant expressly claimed immunity by reason of the Act of Congress, and the highest Court of the State either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right, the decisions of this Court render it clear that it is our duty to pass upon the merits of the Federal question.*" (Italics ours.)

In the *Lindsay* case, *supra*, the Uinted States Supreme Court says:

"In the trial Court it is insisted the operation and effect of the Employers' Liability Act upon the rights of the parties was not involved because that Act was not in express terms referred to in the pleadings or pressed at the trial, and was, hence, not considered by the Court in acting upon the requested charge, and, therefore, it is urged, it was error in the reviewing Court to test the correctness of the ruling of the trial Court by the provisions of the Employers' Liability Act instead of confining the subject exclusively to the safety appliance law and the rules of the common law governing negligence. But the want of foundation for this contention becomes apparent when it is

considered that *in the complaint it was expressly alleged, and in the proof it was clearly established that the injury complained of was suffered in the course of the operation of interstate commerce, thus bringing the case within the Employers' Liability Act.*" (Italics ours.)

On petition for rehearing in the State Supreme Court plaintiff in error urged the decision of this Court in *Toledo & St. L. R. Co.* v. *Slavin*, 59 U. S. (L. Ed.), 671. In that case the plaintiff alleged that the injuries were received by him in the performance of his duties as an employee of the railroad company. Testimony showing that the train on which plaintiff was riding at the time of his injury was engaged in interstate commerce was admitted, and thereupon the railroad insisted that the case was governed by the provisions of the Federal Act, and moved the Court for a verdict in its favor, which motion was overruled, and then the defendant requested the Court to charge the jury several applicable extracts from the Federal statute, all of which were refused. There was a vrdict for the plaintiff, and on writ of error to the Circuit Court of Lucas county that Court held that inasmuch as the plaintiff was injured while engaged in interstate commerce the case was governed by the Federal statute, and that a verdict should have been directed for the defendant. Upon appeal to the Supreme Court of Ohio, the judgment was reversed, and that of the trial Court affirmed without opinion.

In support of the State Court, it was contended that the judgment being reversed without opinion, it should not be construed as meaning that the State Court decided the Federal question adversely to the company's claim, but rather as holding that the defendant's failure to plead the Employers' Liability Act made it improper to consider evidence that plaintiff had been engaged in interstate commerce, and, hence, there was nothing properly in the record to support the contention that the defendant had been deprived of a Federal right.

This Court says:

"But a controlling Federal question was necessarily involved. For when the plaintiff brought suit on the State statute the defendant was entitled to disprove liability under the Ohio Act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law."

It will be seen from the foregoing that in the Slavin case a Federal question was raised in the State Court, in that the testimony bringing the case under the Federal Act was admitted by the State Court, and that an intermediate appeal Court passed upon the question, showing, as was said by this Court in the *Hesterly* case, *supra*, to the effect that the State Court, having held that the question was sufficiently raised and having decided it, that the claim of Federal right had been presented with sufficient clearness.

The Slavin case cites *St. Louis, S. F. & T. Co.* v. *Seal*, 229 U. S., 156. That was a case under the Texas statute. Neither the pleadings of the plaintiff nor defendant presented any issue for the construction or application of the Federal Act. The defendant railroad company entered special exceptions to plaintiff's petition on the ground that the petition did not show that at the time of the accident whether or not defendant was engaged in interstate commerce, and whether or not he was engaged in handling such commerce—that whether State or Federal statute applied depended upon facts not stated, and asked that the plaintiff be required to state the facts as to enable defendant to perceive which statute was relied upon. This motion was overruled. Evidently the motion in the Seal case is what, under the South Carolina practice, would have been a motion to elect, or a motion to make the complaint more definite and certain, and it seems was made before the introduction of testimony by either party, which certainly advertised the plaintiff of an issue to be raised by the defendant and put the plaintiff where he could have elected to rely on either or both statutes by making appropriate allegations. In any event, it seems that without objection evidence was admitted which clearly showed that plaintiff's intestate was engaged in interstate commerce at the time of his death.

Further in the Seal case the Texas Court considered the testimony and decided that plaintiff's intestate at the time of his death was not engaged in interstate commerce, and this Court says:

> "In its opinion on the motion for rehearing the Court (Texas) recognized the supremacy of the Federal statute if applicable, and held that the evidence did not bring the case within that statute."

It will be observed that the complaint in the case at bar does not even allege that plaintiff's intestate was an employee of the defendant, nor is there such allegation in the answer. In the complaint plaintiff's intestate is treated as a member of the general public killed by the negligence of the defendant at a public crossing, hence

the complaint was not demurrable, nor was there any ground for making the allegations more definite and certain, but facts which would have made the Federal Act applicable should have been set forth in answer.

In an exhaustive note to *S. A. L. R. Co.* v. *Horton*, L. R. A., 1915c, pages 78, 79, the author sustains our position that where an action is brought under the State law the applicability of the Federal Act is not put in question by a general denial, but can only be raised by an affirmative pleading or by pleading facts showing its applicability. This note cites the case of *Pelton* v. *Ill. C. R. Co.*, 150 N. W., 236, in which the Court says:

"By the Federal enactment, an employee plaintiff who has a good cause of action has been put in an anomalous position. He does not necessarily know, and frequently does not know, whether at the time of his injury the commerce in which he was engaged was interstate or not. That fact is peculiarly within the knowledge of the defendant employer. Two doors of remedy are set before him. But they are not cumulative; neither are they optional. Only one is available to him. He cannot choose. He can only try. If driven back from the one he has at least the assurance that he may enter the other; but, whichever door he enters, he comes before the same Court. He brings the same case before it. The door of entry only determines the rule of measure of the relief granted. The reason for appropriate pleading by the defendant on this question of abatement is precisely the same whether the plaintiff knocks first at the Federal door or at the other. If challenged at the first, the plaintiff may prefer to acquiesce and to enter by the other door; and this ought to end the issue on that question. *Vice versa*, if plaintiff brings his action under the Federal Act by appropriate allegation, and the defendant acquiesces, this also ought to end the issue on such question. If the defendant desires to make issue on such question, it should be done unequivocally. He should not be permitted to spread the net of a mere general denial, so as to hold in reserve the question of abatement, and in that manner to render it equally available in a second action as in the first. Under cover of such a method of pleading, the defendant might abate both actions successively, the first through plaintiff's failure of proof of the interstate character of the commerce, and the second through defendant's conclusive proof of such character.

> A method of pleading which would permit such mobility to an abatement defense carries its own condemnation."

Roberts Injuries to Interstate Employees, at pages 279-80, discusses the Seal case, *supra*, and quotes the following language from this Court in reversing the Texas Court:

> "It comes, then, to this: the plaintiff's petition as ruled by the State Court stated a case under the State statute. * * * When the evidence was adduced it developed that the real case was not controlled by the State statute, but by the Federal statute. In short, the case pleaded was not proved, and the case proved was not pleaded."

The same author goes on to state the following rule with authorities to sustain it, and which shows wherein the case at bar is differentiated from the Seal case:

> "On the other hand, if the plaintiff's petition states a cause of action under the laws of the State and his evidence establishes and is in harmony with the allegations of the petition, the fatal variance in plaintiff's proof, which appeared in the cases cited in the preceding paragraph, is not existent and the defendant in error, to defeat a recovery under the statute by showing that the case is one arising under the Federal Act, must plead the facts showing that plaintiff at the time of the injury was employed in interstate commerce, and that the carrier was so engaged at said time. Unless such plea is made such evidence is not admissible on behalf of the defendant. * * *"

We submit that our contention, that the pleadings must show some facts, either in complaint or answer, which bring the case under the Act of Congress, and if such facts are not set forth either in the original pleadings or by amendment (which amendment, in most instances, will be allowed even during trial) no Federal question is raised if the State Court under its practice refuses to permit evidence to bring the case under the Federal Act, but proceeds with the trial under the State statute.

Kansas City W. R. R. Co. v. *McAdow*, 60 U. S. (L. Ed.), 252, decided January 31, 1916.

Central Vermont Ry. Co. v. *White*, 238 U. S., 507, 59 L. Ed. 1433.

Wabash R. Co. v. *Hayes*, 234 U. S., 86, 58 L. Ed., 1227.

So. Ry. Co. v. *Bennett*, 233 U. S., 80, 58 L. Ed., 860.

Brinkmeier v. *M. P. Ry. Co.*, 224 U. S., 268, 56 L. Ed., 758.
Bradbury v. *C. R. I. & P. Ry. Co., supra.*
Fleming v. *N. C. R. Co.*, 106 N. C., 196.

Respectfully submitted,

JO-BERRY SLOAN LYLES,
WILLIAM S. NELSON,
J. TEAM GETTYS,
JOHN H. CLIFTON,
Attorneys for Defendant in Error.

APPENDIX.

Section 3230, Volume I, Code of Laws of South Carolina 1912:

"Injuries at Crossings—Penalty and Damages.—If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding section, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law; and that such gross or wilful negligence or unlawful act contributed to the injury."

Sections 3955-57, Volume I, Code of Laws South Carolina 1912, known as Lord Campbell's Act:

"Section 3955. Civil Actions for Wrongful Acts Causing Death.—Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony.

"Section 3956. Beneficiaries of Action for Wrongful Death—Damages Recoverable—Distribution.—Every such action shall be for the benefit of the wife or husband and child, or children, of the person whose death shall have been so caused; and if there be no such wife, or husband, or child, or children, then for the benefit of the parent or parents; and if there be none such, then for the benefit of the heirs at law or the distributees of the person whose death shall have been caused and shall be brought by or in the name of the executor or administrator of such person; and in every such action the jury may give such damages, including exemplary damages where such wrongful act, neglect, or default was the result of recklessness,

wilfulness or malice, as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought. And the amount so recovered shall be divided among the beforementioned parties, in such shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate.

"Section 3957. Limitation of Actions for Wrongful Death —Liability for Costs.—All such actions must be brought within six years from the death of such person, and the executor or administrator, plaintiff in the action, shall be liable to costs in case there be a verdict for the defendant, or nonsuit or discontinuance, out of the goods, chattels and lands of the testator or intestate, if any."

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

NO. 242.

ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

LIZZIE M. MIMS, AS ADMINISTRATRIX OF THE ESTATE OF JOHN J. MIMS, DECEASED, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF SOUTH CAROLINA.

BRIEF OF DEFENDANT IN ERROR.

The defendant in error, with permission of the Court, will rely upon its brief filed in support of the motion to dismiss or affirm, as its brief in this cause, on the hearing of the summary docket, and asks that this additional brief be considered in connection therewith.

NO FEDERAL QUESTION WAS PROPERLY RAISED IN THE STATE COURT.

The jurisdiction of this Court is conferred under Section 709 of the Revised Statutes of the United States, which gives jurisdiction:

> "Where any right, title, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States and the decisions is against the title, right, privilege or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority."

This Court has held that the provision emphasizes the necessity that the right must be specially set up and denied, and in order to maintain jurisdiction the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way, and that the proper time is in the trial Court whenever that is required by the State practice in accordance with which the highest Court of a State will not revise the judgment of the Court below on questions not therein raised, and the proper way is by pleading, motion, exceptions or other action, part or being made part of the record.

Mutual Life Ins. Co. v. *McGrew,* 188 U. S., 309, 47 L. Ed., 480.

The following provisions are found in the Code of Civil Procedure of South Carolina (Vol. II, Code of Laws of South Carolina 1912):

"Sec. 192. The complaint shall contain: * * *

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.

3. A demand of the relief to which the plaintiff supposes himself entitled."

"Sec. 193. The only pleading on the part of the defendant is either a demurrer or an answer. * * *"

"Sec. 194. The defendant may demur to the complaint when it shall appear upon the face thereof, either:

1. That the Court has no jurisdiction of the person of the defendant or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties, for the same cause; or,

4. That there is a defect of parties, plaintiff or defendant; or,

5. That several causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action."

"Sec. 197. When any of the matters enumerated in Section 194 do not appear upon the face of the complaint, the objection may be taken by answer."

"Sec. 198. If no such objection be taken, either by demurrer or answer, the plaintiff or defendant shall be deemed to have waived the same, excepting only the objection to the jurisdic-

tion of the Court, and the objection that the complaint does not state facts sufficient to constitute a cause of action, or that the answer does not state facts sufficient to constitute a defense: *Provided,* That in cases where the objection is made that the complaint does not state facts sufficient to constitute a cause of action, or that the answer does not state facts sufficient to consitute a defense, the party making such objection shall give at least five days' notice, in writing, to the opposite party of the grounds of such objection."

"Sec. 199. The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition."

"Sec. 200. * * *

2. * * * The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they may be such as have been heretofore denominated legal or equitable or both. They must each be separately stated and refer to the cause of action which they are intended to answer in such manner that they may be intelligibly distinguished."

In *Millan* v. *So. Ry. Co.,* 54 S. C., 491, it is held that under this section there need be no care that such separate defenses are inconsistent with each other.

"Sec. 219. Every material allegation of the complaint, not controverted by the answer, as prescribed in Section 199, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply, as prescribed in Section 203, shall, for the purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require."

All of the aforesaid Code provisions were adopted in 1870, excepting the proviso to Section 198, which was adopted in 1903, all long prior to the commencement of this action.

Surely, under the South Carolina Code of Procedure the Supren Court of South Carolina was right when, in its opinion, it state

"The facts in every case should be pleaded." (R., p. 5.)

We call attention especially to the fact that the opinion of t Supreme Court of South Carolina does not hold that the Feder Employers' Liability Act must in terms or by reference to the A be pleaded in the complaint or answer, but that in order to make applicable in a trial in the Courts of that State that facts must be s forth either in the complaint or answer which would bring the ca under the Act, and the Court holds that the exclusion of the tes mony offered was proper as it was not responsive to any issue rais by the pleadings.

In our brief on the motion to dismiss or affirm, at page 11 theree we discussed the case of *Toledo & St. L. R. Co.* v. *Slavin,* 236 U. S 554, 59 L. Ed., 671, and we again urge that that authority does n go as far as the plaintiff in error contends, but this Court held that t Federal Act governs because testimony was admitted in the Sta Court that unquestionably brought the case within the Act. Motio was made for a directed verdict, and requests to charge were su mitted, under the Act, all of which was refused. What the Oh practice and procedure is does not appear, however the Ohio Appe late Courts seem to have considered the question properly raise

Since the Slavin case this Court has rendered its decision in *Ce tral Vermont R. Co.* v. *White,* 238 U. S., 507, and we submit th under that case the decision of the South Carolina Court is on matter of State pleading and practice and is binding on this Cou

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 242

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

LIZZIE M. MIMS, AS ADMINISTRATRIX OF THE ESTATE OF JOHN J. MIMS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM, ETC.

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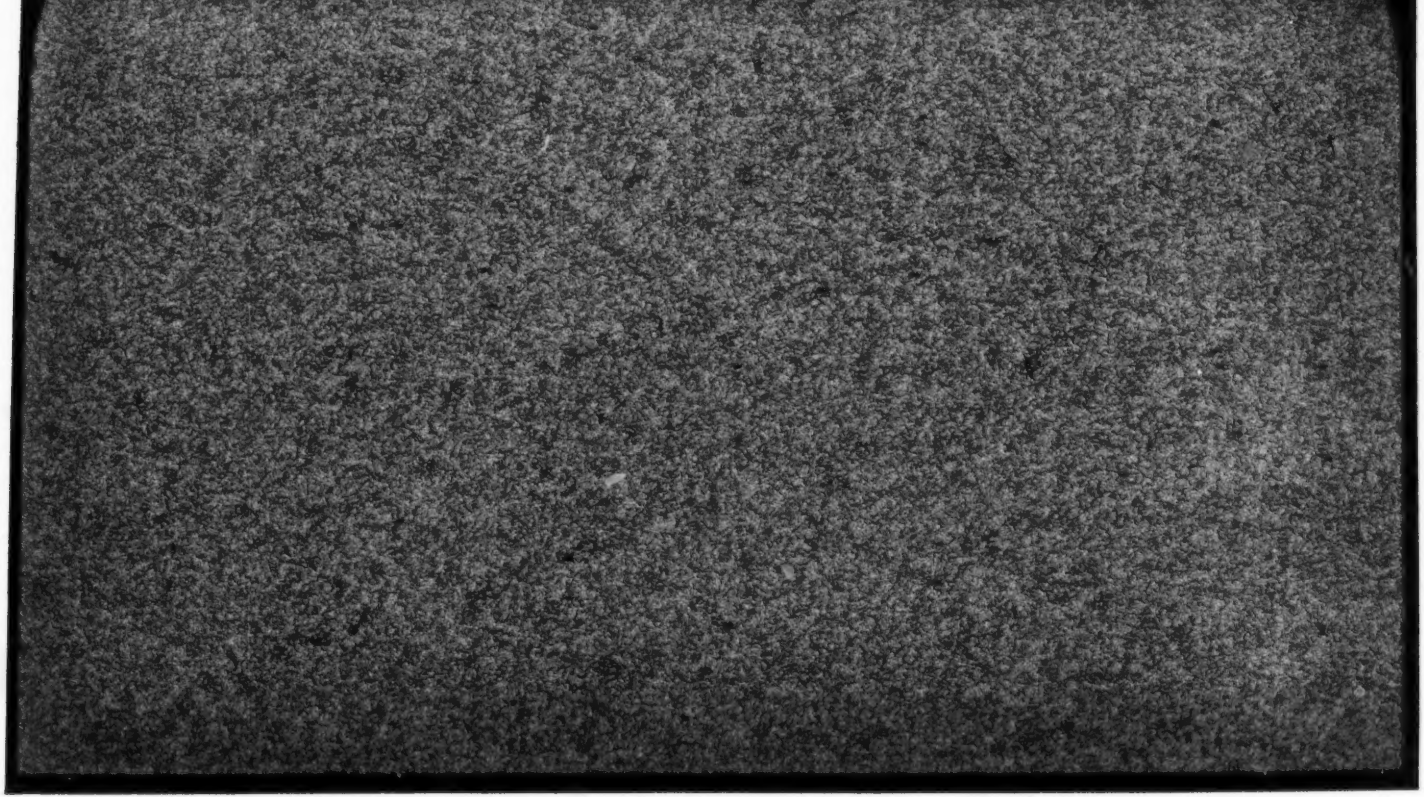

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 629.

ATLANTIC COAST LINE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

LIZZIE M. MIMS, AS ADMINISTRATRIX OF THE ESTATE OF JOHN J. MIMS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OR AFFIRM, ETC.

STATEMENT.

Plaintiff's intestate, John J. Mims, was a car inspector in the employ of the Atlantic Coast Line Railroad Company, the defendant below (plaintiff in error here).

While in the performance of his duties as such he was killed by being run over by a switching engine belonging to said company and being driven by another of its employees.

The accident occurred at or near a street crossing in the vicinity of the passenger station in Sumter, South Carolina.

The defendant in error, Lizzie Mims, is the widow of the deceased, and brought this action as administratrix of his estate for the benefit of herself and her minor children.

The negligence charged by the complaint was the reckless and wanton running backwards of said engine at an excessive and reckless rate of speed, in violation of the company's own rules and regulations, without proper lookout or giving warning of its movement.

The defenses were a general denial, coupled with plea of contributory negligence and a special plea of "gross negligence and willfulness on the part of the deceased."

Neither the complaint nor any of the defendant's pleas referred directly or otherwise to the Federal Employers' Liability Law, approved April 22, 1908, 35 Stats., 65, ch. 149.

In the course of the testimony given on plaintiff's behalf it developed that at the time of the accident the deceased was crossing the company's tracks on his way to inspect train No. 46, called the Orangeburg train, which had just arrived at the station (R., 12).

Thereupon the attorney for the defendant company announced that defendant would offer evidence "to show that train No. 46 was a train engaged in interstate commerce and that the deceased Mims was in this respect and otherwise engaged in interstate commerce," and that "the statute or law under which plaintiff has brought her action has been superseded * * * by the act of the Congress of the United States known as the Federal Employers' Liability Act of April 22, 1908, 35 Stats., 65, ch. 149" (R., 21).

Pursuant to such announcement various witnesses were called on behalf of defendant to prove that at the time of the accident both the deceased and the defendant company were engaged in interstate commerce within the meaning and provisions of the act of Congress cited, but the learned trial judge sustained objections made to the introduction of all such testimony and refused to permit the same in evidence because, as he stated from the bench, it had "no place in this case, interstate commerce cannot cut the State court out of jurisdiction to try this case," and was "irrelevant and not pleaded, and not brought up as an issue in this case" (R., 22), and was "generally incompetent, not relevant" (R., 23).

Similar rulings barring out all such evidence as and when offered in detail appear on pages 26, 27, 29, and 30 of the record, and the exceptions to such rulings appropriately preserved of record appear at pages 40 to 43, inclusive, thereof.

Under the charge of the trial judge, in the course of which, among other things, the jury was told that the statute (State) under which the action had been brought "says damages shall include both actual and punitive damages as are proportioned to the injury sustained by the persons by whom and on whose behalf the action is brought" * * * and that "To prevent the plaintiff from recovering it must be made to appear to the satisfaction of the jury that he was guilty of more than mere negligence, and that he was guilty of gross or wilful negligence, or was acting in violation of law, and that such gross or wilful negligence, or unlawful act, contributed to the injury as a proximate cause thereof" (R., 37), the jury returned a verdict in favor of the plaintiff for $16,000, and judgment was entered accordingly (R., 1).

On appeal, the Supreme Court of South Carolina upheld the rulings of the trial judge, and affirmed the judgment

appealed from in an opinion (100 South Carolina, 395) which, in pertinent part, is as follows:

(R., 44:)

WATTS, *A. J.*:

> "This was an action by plaintiff as administratrix for the benefit of herself and her four minor children to recover damages for the death of her husband on December 19, 1910, caused by the alleged joint and concurrent carelessness, negligence, recklessness, wilfulness, and wantonness of the defendants. * * * The suit was brought under what is commonly known as the Lord Campbell's act. The allegations of the complaint and answer do not show that plaintiff's intestate was engaged in interstate commerce at the time he was killed. * * * As soon as plaintiff's case was closed the counsel for defendants announced that train 46 which plaintiff's intestate was inspecting while (when) killed was engaged in interstate commerce, and that they would introduce testimony to show that in the inspection of this train and otherwise the plaintiff was engaged in commerce between the States, and consequently the Statute under which plaintiff was bringing her case had been suspended by the act of Congress of the United States known as the Federal Employers' Liability Act, April 22nd 1908. The (trial judge) refused to allow the defendants at that time under the pleadings to raise this issue and refused to admit any testimony in regard thereto." * * *

(R., 45:)

> "Exceptions 1 and 2 allege error on the part of the presiding judge in refusing to allow certain testimony, which the appellants contend would show that when plaintiff's intestate was killed he was engaged in interstate commerce and in refusing to allow testimony which defendants' counsel stated they would offer for the purpose of bringing the case under the Employers' Liability Act, and the remarks of the judge at that time. His honor took the position that the testimony was irrelevant and not responsive to

the pleadings and not an issue in the case. That the case had been passed upon by the Supreme Court and an amendment over objection of plaintiff allowed just before proceeding with the second trial. After the plaintiff's testimony was all in for the first time it seems to have occurred to the defendants that they wanted to avail themselves of the Federal statute, Employers' Liability Act. The facts in every case should be pleaded. Whenever the pleadings show facts pleaded that the case is one that can be tried either under the Federal or State law then the court can try it under either law. When the pleadings show facts that bring it under the Federal law it must be tried under the Federal law, and when the pleadings show it is brought under the State law *is* (it) must be tried under that law.

"The complaint was filed April 5, 1911 * * * It does seem to us that justice and fair dealing under all of the circumstances of the case should have *been* required the defendants if they intended to invoke the benefits which they thought would issue to them under the act of Congress to plead the facts applicable to bring it under the act. It would be an injustice at this stage of the case to allow this defense." * * *

(R., 46:)

"The plaintiff alleges that she has a cause of action against the defendants and is entitled to a trial either under the State or Federal law, the pleadings made out a case to be tried under the State law, and under the pleadings his honor was correct in ruling as he did. It is not necessary to plead either a State or Federal statute, but it is necessary to plead facts which bring it under the one or the other, and when the pleadings show that it was interstate commerce the State or Federal courts try it, and Federal law governs. When the pleadings show it was intrastate commerce the State law governs. The defendants should have pleaded the Federal act or at least such facts as would render the act applicable, and inasmuch as they did not do so and the pleadings made out a case based on the State law the exclusion of the evidence by his

honor complained of was proper as it was not responsive to any issue raised by the pleadings. If there had been an allegation in the answer that brought it within the Federal Employers' Liability Act it would have been controlled by the act, although the provisions may not have been referred to in express terms in the pleadings, and proof would be allowed in the case, but in this case there is no such allegation and his honor committed no error, and these exceptions are overruled."

ASSIGNMENT OF ERRORS.

The Supreme Court of South Carolina erred—
In holding and deciding that—

1. "The facts in every case should be pleaded" and "when the pleadings show it is brought under the State law it must be tried under that law"; and

2. That if the defendant railroad company intended to invoke the benefits of the Employers' Liability Act it was incumbent upon it "to plead the facts applicable to bring it under the act." Not having done so, and the case made out by the pleadings being "based on the State law, the exclusion of the evidence * * * complained of was proper," it not being responsive to any issue raised by the pleadings.

3. In affirming the judgment of the Court of Common Pleas for Richland County, thereby denying to plaintiff in error rights, privileges, and immunities under a law of the United States sought to be set up and claimed in proper course before the trial court.

ARGUMENT.

The motion to dismiss is plainly untenable and should be denied.

St. Louis & San F. Ry. Co. *vs.* Seale, 229 U. S., 156, 159, 161.
North Carolina R. Co. *vs.* Zachary, 232 U. S., 248.
Toledo, St. Louis & Western R. R. Co. *vs.* Slavin, 236 U. S., 454, 457.

In the Slavin case neither the complaint nor the answer contained any reference to the Employers' Liability Act, but, over plaintiff's objection, evidence was admitted which showed that the plaintiff, according to the allegations of his complaint, while in the performance of his duties in charge of a switching engine was riding on a car forming part of a train engaged in interstate commerce and belonging to defendant. Appropriate motions properly invoking the application of the Federal statute were made and overruled and verdict and judgment given for plaintiff and affirmed by the Supreme Court of Ohio. On writ of error this court, speaking through Mr. Justice Lamar, said:

> "But a controlling Federal question was necessarily involved, for, when the plaintiff brought suit on the State statute the defendant was entitled to disprove liability under the Ohio act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And, if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law.
>
> "In this respect the case is much like St. Louis, &c., Ry. *vs.* Seale, 229 U. S., 156, 161, where the suit was brought under the Texas statute, but the testimony

> showed that the plaintiff was injured while engaged in interstate commerce. The court said: 'When the evidence was adduced it developed that the real case was not controlled by the State statute, but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the State courts erred in overruling it.' The principle of that decision and others like it is not based upon any technical rule of pleading but is matter of substance, where, as in the present case, the terms of the two statutes differ in essential particulars."

In the case at bar the Federal statute and the South Carolina statute differed in essential particulars; for example, in the matter of contributory negligence less than gross or willful as a defense and the power to assess punitive damages, in both cases the State statute being the more oppressive so far as the defendant's position was concerned.

While differing in its circumstantial details, the case of Central Vermont Ry. *vs.* White, 238 U. S., 507, 513 (point 5), was adjudged in principle conformably with the above cases.

The duties being performed by Seale, "a yard clerk," in the first cited case (229 U. S., 156, 159) differed but slightly, if at all, from those being performed (R., 9) by Mims in the present case.

That such duties when performed or about to be performed in connection with a car or train or other instrumentality of interstate commerce constituted the employee as engaged in interstate commerce is settled.

> Seale case, *supra.*
>
> Shanks *vs.* Del., Lack. & West. R. R., 239 U. S., 556, 559.

That the testimony offered and rejected was pertinent and sufficient to prove that the train which Mims was on his way to inspect was engaged in interstate commerce, though moving only between terminii within a single State, is likewise established by the above-cited cases.

As was said in St. Louis, &c., Ry. *vs.* Hesterly, 228 U. S., 702, where it had been suggested by the defendant in error, Hesterly, that the defendant had estopped itself from relying upon the Federal law by pleading contributory negligence under the State law:

> "Moreover, the plaintiff, not the defendant, had the election how the suit should be brought, and as he relied upon the State law, the defendant had no choice, if it was to defend upon the facts. * * *
>
> "Coming to the merits it now is decided that the act of Congress supersedes State laws in the matter with which it deals. * * *
>
> "Therefore the ruling of the State court was wrong." * * *

Upon the authorities above cited it would seem quite plain that not only the motion to dismiss but also the motion to affirm should be denied.

This brings us to the third proposition embraced in defendant in error's motion, viz., in the event the court should desire to hear argument on the questions involved, the motion that this cause be transferred to the summary docket and there be proceeded with as a short cause, the suggestion being that the cause is of such a charcater as not to justify extended argument.

In this suggestion we concur, but while so doing we venture to suggest that in the light of the decided cases hereinbefore cited the judgment of the Supreme Court of South

Carolina is so plainly erroneous and so necessary to be reversed that oral argument, whether extended or otherwise, would be superfluous. As the defendant in error by his motion has fully disclosed not only his position upon the Federal question, but also the merits of the case itself, in so far as the only question here open for review is concerned, and as no differences in matters of fact or circumstance requiring elucidation have developed, we suggest that the rights of all parties would be perfectly preserved and the time of the court would be very properly conserved if the court upon its present inspection of the record and briefs should conclude that the judgment must be reversed and should so order.

We respectfully submit motion to that end.

This case differs from Chicago & N. Western Ry. Co. *vs.* Gray, 237 U. S., 399, and Chicago, Rock Island & Pacific Ry. Co. *vs.* Wright, 239 U. S., 548, *supra,* in that, as above pointed out, material differences operating prejudicially to the plaintiff in error exist between the State and Federal statutes in question.

It is respectfully submitted that the judgment of the Supreme Court of South Carolina under review should be reversed and the cause remanded to that court for further proceedings.

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